

TOH TIAM CHEOW &amp; ORS

a

v.

BERJAYA TIMES SQUARE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR

b

ARIFIN ZAKARIA J

[ORIGINATING SUMMON NO: S3-24-3047-2001]

21 MARCH 2002

**CONTRACT:** *Sale and purchase of property - Damages for late delivery - Whether assessment of damages dependant upon date of delivery of vacant possession - Whether damages due only after such date is ascertained*

c

The plaintiffs entered into a sale and purchase agreement ('the S&P agreement') with defendant for a piece of property. The plaintiffs submitted that the defendant failed to deliver vacant possession as per the S&P agreement and claimed for various declaratory reliefs including damages for late delivery under cl. 22 of the S&P agreement. The defendant contended that the plaintiffs could not claim for damages under the said clause as the assessment of damages depended upon the date of delivery of vacant possession and that date had yet to be ascertained.

d

e

**Held:**

[1] Clause 22(2) of the S&P agreement in substance imposed an obligation to pay, in substitution for any other right to damages which the purchaser might otherwise have, a single sum to be calculated and ascertained at a particular date. Thus, liquidated damages only became due and payable at the date of the delivery of vacant possession. Prior to that, such damages could not be claimed by the plaintiffs as it could not as yet be ascertained. (pp 305 d & 306 b & g)

f

*[Plaintiffs' claim dismissed with costs.]*

g

**Case(s) referred to:**

*Christina Angelina William Bastian & Anor v. Newacres Sdn Bhd* [1996] 2 BLJ 509  
(*refd*)

*Hoo See Sen & Anor v. Public Bank Bhd & Anor* [1988] 1 CLJ 768; [1988] 1 CLJ  
(Rep) 125 (*refd*)

h

*Insun Development Sdn Bhd v. Azali Bakar* [1996] 2 CLJ 753 (*dist*)

*Loh Wai Lian v. SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1 (*foll*)

*Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd* [1985] 1 CLJ 62; [1985] CLJ  
(Rep) 242 (*refd*)

i

- a** *SEA Housing Corporation Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305 (**refd**)  
*Tan Yang Long & Anor v. Newacres Sdn Bhd* [1992] 1 CLJ 211 (**dist**)  
For the plaintiffs - Chan Vy Sing; (Lam Cheng Wun); M/s Lee & May  
For the defendant - Edmund Bon; M/s Chooi & Co

- b** [Editor's note: For a similar case on damages for late delivery, see *Eu Kim Kee & Yang Lain lwn. Berjaya Times Square Sdn Bhd & Satu Lagi* [2002] 7 CLJ 213]

Reported by M Maheswaran

### JUDGMENT

**c**

**Arifin Zakaria J:**

This is an application by the plaintiffs for various declaratory reliefs against the defendant arising from the sale and purchase agreement dated 11 August 1995 ("the said agreement"). The declarations prayed for are:

**d**

- (a) that as at 20 July 2001 the plaintiffs are entitled to damages in the sum of RM414,928.34 arising from the delay of the defendant to deliver vacant possession of parcel No. 04-56, Tingkat 4, Berjaya Times Square ("the said premise") pursuant to the said agreement;

**e**

- (b) that the plaintiffs are entitled to set off the said sum of RM414,928.34 against the sum due and payable to the defendant of RM128,390; and

- (c) that the defendant is to pay the plaintiffs damages at the rate of 12% per annum on the sale price of the said premise from 31 July 2000 to the date of delivery of vacant possession.

**f**

**The Background Facts**

The 1st plaintiff and one Yap Kin Liang @ Yap Kiat Seng (deceased) had on 11 August 1995 entered into the said agreement with the defendant whereby the plaintiff and Yap Kin Liang agreed to purchase the said premise from the defendant for the sum of RM1,283,900. Yap Kin Liang is now represented by 2nd and 3rd plaintiffs as administrators of the estate. The rights under the said agreement was assigned to the 4th plaintiff as security for the loan given by the 4th plaintiff to the 1st plaintiff and Yap Kin Liang. The 4th plaintiff had consented to being named as the 4th plaintiff herein. This is necessary in view of the ruling in *Christina Angelina a/p William Bastian & Anor v. Newacres Sdn. Bhd.* [1996] 2 BLJ 509.

**g**

**h**

**i**

**The Plaintiffs' Claim**

The claim by the plaintiffs arose out of the alleged breach by the defendant of cl. 22 of the said agreement, which reads as follows:

**22. TIME FOR HANDING OVER OF VACANT POSSESSION**

- (1) The Premises shall be completed by the Developer and vacant possession of the Premises shall be handed over to the Purchaser within thirty-six (36) calendar months from the date of this Agreement ("36-Month Period") PROVIDED ALWAYS that the Purchaser shall irrevocably grant to the Developer an extension of three (3) months from the expiry of the 36-Month Period ("Extended Period") in the event that vacant possession of the Premises is not handed over to the Purchaser within the 36-Month Period.
- (2) If the Developer fails to hand over vacant possession of the Premises within the Extended Period, the Developer shall pay **immediately** to the Purchaser liquidated damages to be calculated from day to day at the rate of twelve per centum (12%) per annum of the Purchase Price from the date of the expiry of the Extended Period up to the day of delivery of vacant possession of the Premises.
- (3) For the avoidance of doubt, the Purchaser hereby agrees that no claim shall be maintained or instituted against the Developer for any damages, loss, interest, costs and expenses in the event the Developer hands over vacant possession of the Premises after the 36-Month Period but within the Extended Period.

It is not in dispute that the defendant has failed to deliver vacant possession within the stipulated period and until the date of hearing of this application vacant possession has yet to be delivered. Up to the time of this application the sum of RM1,155,510 had been paid by the plaintiffs, thus leaving a balance sum of RM128,390 to be paid by the plaintiffs under the said agreement. It is not disputed that there has been a delay of 983 days up to the date of hearing of this application. Based on the agreed liquidated damages at the rate of 12% per annum of the purchase price, the plaintiffs claim that the amount of liquidated damages due and payable to them comes to RM414,928.34. On that premise the plaintiffs' solicitors had by notice dated 13 April 2001 addressed to the defendant requested for the liquidated damages to be utilised as a set off against the balance of the purchase price. The defendant has not responded to the said notice and hence this application.

**a The Plaintiffs' Submission**

It is submitted for the plaintiffs that since the claim herein arose out of the same transaction (under the said agreement), therefore, the plaintiffs are entitled to a set off. For authority the plaintiffs cited the case of *Permodalan Plantations Sdn. Bhd. v. Rachuta Sdn. Bhd.* [1985] 1 CLJ 62; [1985] CLJ (Rep) 242. The plaintiffs further contend that since the plaintiffs' claim is far in excess of the balance of the purchase price, therefore, relying on the authority of *S.E.A. Housing Corporation Sdn. Bhd. v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305 the plaintiffs should, therefore, be granted the declarations sought for herein. In *S.E.A. Housing Corporation* the respondent had sued the appellants for damages for breach of contract and for delivery of documents of title relating to land and house in Petaling Jaya. The respondent had agreed to purchase the property from the appellants and it was a term of the agreement that the building on the said property should be completed within a period of 18 months from the date of the agreement. The building was only completed some 23 months after that date.

In that case it was held, *inter alia*, that the respondent did not breach the agreement when she withheld payment of the amount demanded by the appellant. The respondent's cross-claim and the appellant's claim arose out of the same transaction and are closely connected to each other. The respondent's cross-claim was so closely connected with appellant's demand that it would be manifestly unjust to allow the appellant to enforce payment without taking into account the respondent's cross-claim. The plaintiffs further relied on the case of *Hoo See Sen & Anor v. Public Bank Bhd. & Anor* [1988] 1 CLJ 768; [1988] 1 CLJ (Rep) 125 which is a decision of the Supreme Court in support of the plaintiffs' claim.

**f Defendant's Submission**

The defendant's contention is that the plaintiffs' claim centred on the construction of cl. 22(2) of the said agreement. The defendant contends that the plaintiffs could not invoke cl. 22(2) of the said agreement because the date of delivery of vacant possession of the said premise has yet to be ascertained. As such, the defendant contends that the single sum to be paid as liquidated damages as contemplated by cl. 22(2) of the said agreement cannot be calculated and ascertained; and until that single sum has been calculated and ascertained liquidated damages under cl. 22(2) does not become due and cannot be sued for. The defendant essentially relied on the case of *Loh Wai Lian v. S.E.A. Housing Corporation Sdn. Bhd.* [1987] 2 MLJ 1 and *Insun Development Sdn. Bhd. v. Azali bin Bakar* [1996] 2 CLJ 753 in support of its contention.

**i**

**Finding Of Court**

I am of the considered view that the core issue in this case turns on the construction of cl. 22(2) of the said agreement. The said clause reads as follows:

22.

- (2) If the Developer fails to hand over vacant possession of the Premises within the Extended Period, the Developer shall pay **immediately** to the Purchaser liquidated damages to be calculated from day to day at the rate of twelve per centum (12%) per annum of the Purchase Price from the date of the expiry of the Extended Period **up to the day of delivery of vacant possession of the Premises.** (emphasis added)

It would appear that based on cl. 22(2) liquidated damages only become due and payable at the date of the delivery of vacant possession. Thus, prior to that no liquidated damages could be claimed by the plaintiffs as it could not as yet be ascertained. This conclusion is supported by the Privy Council case of *Loh Wai Lian v. S.E.A. Housing Corporation Sdn. Bhd.* (*supra*). The facts of that case is clearly set in the headnotes of the report which are as follows:

In this case the respondent, a licensed housing developer, had entered into a contract for the purchase of a shop house to be erected on a housing estate for RM175,000 payable by stage payments as the building proceeded, Clause 17 of the contract provided:

Subject to clause 32 hereof and/or to any extension or extensions of time as may be allowed by the Controller the said building shall be completed and ready for delivery of possession to the purchaser within eighteen (18) calendar months from the date of this Agreement. Provided always that if the said building is not completed and ready for delivery of possession to the purchaser within the aforesaid period then the vendor shall pay to the purchaser agreed liquidated damages calculated from day to day at the rate of eight per centum (8%) per annum on the purchase price of the said property from such aforesaid date to the date of actual completion and delivery of possession of the said building to the purchaser.

In fact the building was not completed on the due date ie, September 18, 1975. Possession was not finally delivered until November 7, 1977. On April 21, 1980 the appellant demanded payment of the sum of RM29,972.61, a sum equivalent to 8% on the full price RM175,000 calculated for a period of twenty five months and twenty one days. On September 9, 1982, the appellant applied for summary judgment. Judgment was given by the Senior Assistant Registrar for the appellant. The respondent appealed to the High Court, where the appeal was allowed, the learned Judge holding that it was statute barred as he held

- a* that the action had accrued on September 18, 1975 when the period of eighteen months prescribed by the contract expired. A further appeal to the Federal Court was dismissed – see [1984] 2 MLJ 280, and the appellant appealed to the privy court.
- b* There it was held, *inter alia*, that the only sensible construction of cl. 17 is that it imposes an obligation to pay, in substitution for any other right to damages which the purchaser might otherwise have, a single sum to be calculated and ascertained at a particular date and until that sum has been ascertained it does not become due and cannot be sued for.
- c* In that case Lord Oliver of Aylmerton at p. 4 provides the underlying reasons behind the decision in the followings words:
- d* A construction which would import into the clause a fresh obligation on the vendor to pay the calculated amount at the end of each day would be capricious, involving as it does a series of breaches of contract as each day passes without payment being made. The whole tenor of the clause is, in their Lordships’ view, that the vendor is assuming as a matter of contract and subject to the occurrence of the condition precedent that the building remains uncompleted on the stipulated date, an express contractual obligation to pay a single sum which cannot become due, because it cannot be ascertained, until the building has been completed and possession can be delivered. If the question is asked “in the absence of such an express provision when would the purchaser’s right of action for damages for breach of contract accrue?”, the answer is plainly the date on which the breach occurred. But parties to a contract are, of course, entitled to regulate or modify their rights in the event of breach in any way that they think fit and the accrual of any cause of action then becomes a matter of the correct construction of what they have provided.
- e* This appeal raises no point of principle but simply a question of what is the true construction of the contract in which, the parties entered. In their Lordships’ judgment, the only sensible construction of clause 17 is, as Mr. Kidwell has contended, that it imposes an obligation to pay, in substitution for any other right to damages which the purchaser might otherwise have, a single sum to be calculated and ascertained at a particular date and that until that sum has been ascertained it does not become due and cannot be sued for.
- f*
- g*
- I agree with the defendant’s submission that cl. 17 as found in *Loh’s* case is in substance similar to our cl. 22(2).
- h* Further I find that the case of *Insun Development Sdn. Bhd. v. Azali bin Bakar* (*supra*) cited by both parties herein could not support the plaintiffs case either. In my opinion cl. 18 of the agreement which came for consideration of the court in that case was not similar to cl. 22(2) in the present case. It is manifestly clear that cl. 18(2) in *Insun* on which the decision of the court was merely stipulates the opening date (*terminus a quo*) but not the closing
- i*

date (*terminus ad quem*), unlike cl. 17 in *Loh* where there are provisions for both the opening date and the closing date. For that reason, I believe, in *Insun* the court there held that liquidated damages are due and can be sued for as soon as the agreed delivery date for vacant possession has passed without regard to the actual date of delivery of vacant possession. This distinction between cl. 18(2) in *Insun* and cl. 17 in *Loh* does not go unnoticed by the Federal Court. Thus, at p. 762 the Supreme Court observed:

It is clear law that in the absence of express contractual provision, the purchaser's right to sue for damages would accrue on the date of the breach of contract ... But, the parties to a contract are free to regulate or modify their rights in the event of breach thereof in such a manner as to postpone the date of accrual of their right to sue for damages which, of course, was what had happened in *Loh Wai Lian*.

At p. 763 the Supreme Court held that:

It follows, therefore, that our answer to the crucial question aforesaid is; because the agreement by cl. 18(2) had provided for a formula for the calculation of liquidated damages which defined the *terminus a quo* (the opening date) but not the *terminus ad quem* (the closing date), the purchaser's right of action for damages for breach of contract – following the general rule – accrued on the date of the breach which, in this case, was the day after the time limited under cl. 18(2) for the delivery of vacant possession, that is to say, on 12 December 1986.

Turning to the case of *Tan Yang Long & Anor v. Newacres Sdn. Bhd.* [1992] 1 CLJ 211 I am of the view that that case is, on the facts, distinguishable from the present case. This is borne out by what was said by Mahadev Shankar J (as he then was) at p. 214:

The substantial defence of *Newacres* is that the only remedy which the plaintiffs have is for liquidated damages as provided by the Act and nothing else: As to this, the defendant says that no matter how long delivery is delayed, no damages need be paid until the day when the building is completed and vacant possession is delivered. In the present context since it is not known when completion will take place, the defendant is urging that the plaintiffs must wait indefinitely.

I find this submission devoid of merit, and quite unconscionable.

Clause 13.2 of the agreement admittedly provides for liquidated damages of 8% of the purchase price for each day's delay till actual delivery of vacant possession but nowhere does it say that such damages are not to be paid unless and until vacant possession is actually delivered. On the contrary it provides that such liquidated damages are to be calculated from day to day which implies a right to be paid on a day to day basis as long as the default continues.

- a* In this case *Newacres* disregarded the plaintiffs' claim for liquidated damages. I do not need to consider what may have happened if they had paid it from time to time. Time was of the essence. By February 1989 there was a delay of nearly a year. I regard the total failure of *Newacres* to give any credible assurance as to if and when the project would be completed to amount to a renunciation or abandonment of the agreement. Their conduct amounted to a fundamental breach of contract. *Law Ngei Ung & Anor. v. Tamansari Sdn. Bhd* [1989] 2 CLJ 181; [1989] 2 CLJ (Rep) 44 is very much in point.

- b*
- c* Mr. Tan who urged everything which could be said for *Newacres* relied very heavily on *Loh Wai Lian v. S.E.A. Housing Corporation Sdn. Bhd.* [1987] 2 MLJ 1 and particularly on the 2nd para at p. 4 as supporting his proposition that the only remedy a purchaser has in these circumstances is a cause of action for liquidated damages, and that in all cases this cause of action does not accrue until the day when vacant possession is delivered because it is only on that day that the single sum to be paid can be ascertained and so only thereby becoming due and be sued for.

- d* With respect I am unable to agree that the case supports such a sweeping proposition. The obligation to pay liquidated damages is only one remedy for late delivery which if accepted will be in substitution of all others.

- e* As it appears to me the crucial issue before the court in that case is whether the conduct of the defendant amounted to a renunciation or abandonment of the agreement. There the learned judge held that the conduct of the plaintiff amounted to a fundamental breach of the contract. For those reasons I am of the view that the case of *Tan Yang Long & Anor v. Newacres Sdn. Bhd.* does not apply to the present case.

- f* To conclude, it is my considered view that, on the facts as found in this case, the Privy Council's decision in *Loh* is directly on point with the present case. For the above reasons I dismissed the plaintiffs' claim herein with costs.

*g*

---

*h*

*i*